

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WALLACE J. DESMARAIS, JR.,)
)
Plaintiff,) C.A. No. 15-01226-LPS-CJB
)
v.)
)
FIRST NIAGARA FINANCIAL)
GROUP, INC.,)
)
Defendant.)

Wednesday, February 24, 2016
9:30 a.m.
Courtroom 2A

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE CHRISTOPHER J. BURKE
United States District Court Judge

APPEARANCES:

FARUQI & FARUQI, LLP
BY: JAMES R. BANKO, ESQ.
BY: DERRICK B. FARRELL, ESQ.

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:

2 RICHARDS, LAYTON & FINGER, PA
3 BY: SARAH ANNE CLARK, ESQ.

4 -and-

5 SULLIVAN & CROMWELL, LLP
6 BY: LAURA KABLER OSWELL, ESQ.

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1 THE COURT: Everyone, before we
2 get started, let me just say a few things for
3 the record. The first is that we're here today
4 in the matter of Desmarais versus First Niagara
5 Financial Group, Incorporated, et al. This is
6 civil action number 15-1226-LPS-CJB here in our
7 court. We're here today for argument on
8 Plaintiff's motion for expedited discovery.

9 Before we go further, let me have
10 counsel for each side introduce themselves for
11 the record and let's start with counsel for
12 Plaintiff's side and beginning with Delaware
13 counsel.

14 MR. FARRELL: Good morning, Your
15 Honor. Derrick Farrell from Faruqi & Faruqi for
16 the Plaintiffs and with me is my colleague, Mr.
17 James Banko.

18 THE COURT: Okay. Welcome.

19 MR. BANKO: Thank you.

20 THE COURT: And counsel for the
21 Defendants.

22 MS. CLARK: Good morning, Your
23 Honor. My name is Sarah Clark from Richards,
24 Layton & Finger here for Defendants. With me at

1 counsel table is Laura Oswell. We entered our
2 pro hac papers. They have not yet been granted,
3 but with your permission Ms. Oswell will be
4 doing today's argument.

5 THE COURT: I'll grant that
6 permission for today's purposes. I'm sure that
7 will come through shortly.

8 Counsel, I know I've allocated 30
9 minutes per side for argument on the motion and
10 since it's Plaintiff's motion, I'll have them go
11 first. And after we've finished that we have
12 some logistical issues in the case as well
13 before we're finished, but who will be speaking
14 for Plaintiff's counsel today?

15 MR. FARRELL: I will, Your Honor.

16 THE COURT: Okay. Let's have
17 Plaintiff's side come forward and I'll let you
18 make your presentation and I may have some
19 questions for you as well.

20 MR. FARRELL: Sure. Before the
21 Court today is a very narrow issue of whether
22 the PSLRA discovery stay should be lifted or
23 produce a very finite set of documents that have
24 already been produced to the Plaintiffs in a

1 related action that is pending out in the State
2 of New York, New York State Court that asserts
3 breach of fiduciary duty action as opposed to
4 here where we have securities law claims.

5 THE COURT: So Mr. Farrell, just
6 to be clear about it. The documents you're
7 asking for, these are the documents that have
8 been produced in the New York State action, that
9 is the six actions in New York State, and not
10 necessarily any documents produced in the
11 Delaware action?

12 MR. FARRELL: Yes. My
13 understanding based on reviewing the records and
14 defense counsel will have to inform us as to
15 what specifically is going on, is that nothing
16 has been produced to my knowledge so far in the
17 Delaware action where there's, as you mentioned,
18 only one being filed, but there have been
19 documents produced in the New York action, which
20 I believe are the core documents such as board
21 minutes and banker books which are highly
22 relevant to our disclosure claims.

23 THE COURT: And how many documents
24 are we talking about that have been produced in

1 the New York State actions?

2 MR. FARRELL: Unfortunately I
3 don't know the specific number at this point, so
4 I'd have to confer with defense counsel.

5 THE COURT: So to the extent your
6 motion talks about a limited production or a
7 particularized productions, when we're talking
8 about the number of documents you don't know
9 whether that's a hundred or a million pages or
10 something in between?

11 MR. FARRELL: Currently no, but I
12 would suspect it's relatively small, which is
13 customary in these cases.

14 THE COURT: Sure. Let me let you
15 continue.

16 MR. FARRELL: Sure. There are
17 essentially three key issues here. The first is
18 whether we have met our burden under the PSLRA
19 that the stay should be lifted. Defendants also
20 argue that discovery is not appropriate
21 currently under Rule 26, but I think the key
22 issue here relates to the PSLRA discovery stay
23 and I intend to focus on that first unless Your
24 Honor has any questions.

1 THE COURT: Just so no dispute
2 really that it's the PSLRA discovery stay
3 provisions and the ability to get over that is a
4 stricter standard, a higher hurdle, than a
5 reasonable test, for example, to overcome Rule
6 26 prescription on early discovery, that's the
7 one you need to focus on. If you can get over
8 that, presumably you can get over the Rule 26
9 related hurdle, am I right?

10 MR. FARRELL: Yes, that's exactly
11 my view, that because the hurdle is higher on
12 the PSLRA issue, it makes sense to focus on
13 that. If that is satisfied, then I think Rule
14 26 is equally satisfied.

15 THE COURT: Okay.

16 MR. FARRELL: The second issue I
17 want to focus on is what I'll call the scope and
18 materiality issue. And I'll walk through some
19 of the key disclosure issues and explain why the
20 documents we believe were produced in the New
21 York action are relevant to those disclosure
22 issues.

23 And then finally I want to address
24 what I'll refer to as the laches argument that's

1 put forward by Defendants. Now, Defendants
2 routinely refer to the discovery stent of the
3 PSLRA that a stay is only lifted under
4 extraordinary circumstances, they use that
5 language throughout the brief. But I think it's
6 important to focus on the language that's
7 actually used in the statute. And the PSLRA
8 says that in any private action arising under
9 this chapter, all discovery in other proceedings
10 shall be stayed during the pendency of any
11 motion to dismiss, unless the Court finds on the
12 motion of any party that particularized
13 discovery is necessary to preserve evidence or
14 to prevent undue prejudice to that party. And
15 what the case law teaches us is that the
16 irreparable harm standard is actually a higher
17 standard than undue prejudice. I think it's
18 important for the Court to note that it's quite
19 well established that where there is an
20 uninformed vote, that leads to irreparable harm.
21 So I think it's quite easy that because we've
22 alleged material disclosure claims, that we meet
23 the undue prejudice standard because I think we
24 meet the even higher irreparable harm standard.

1 And one of the key cases we rely
2 on is the Enron decision out of the Southern
3 District of Texas and their documents have been
4 produced in a related action. The Plaintiffs
5 asked for them to be produced in the securities
6 action and they pointed out that the PSLRA
7 discovery stay was intended to prevent fishing
8 expeditions and it was not designed to keep
9 secret from counsel in securities cases
10 documents that have already become available for
11 means other than in the securities case. And as
12 here, the Defendants there claim that because
13 the motion to dismiss has been filed, the Court
14 should strictly adhere to the PSLRA discovery
15 stay and not produce documents that already have
16 been produced in the other case. And the Court
17 disagreed with Defendants there and held quote,
18 in a sense this discovery has already been made
19 and is merely a question of keeping it from a
20 party because of the strictures of a statute
21 designed to prevent discovery abuse. And then
22 thereafter required the documents be produced.

23 Similarly in Kneiting, they
24 actually were produced in another case. It was

1 a preliminary injunction motion and the Court
2 required what I would call that the core
3 documents to be produced, those were the banker
4 books, the board minutes, things of that nature
5 that are routinely produced in this case and
6 lifted the stay. So there we weren't with the
7 situation where documents had already been
8 produced and all you have to do is copy a CD,
9 but rather actually going and collecting
10 documents and producing them. Because again
11 there is undue prejudice here because of the
12 irreparable harm that would result from an
13 uninformed vote.

14 Now Defendants point to a number
15 of cases where documents had already been
16 produced in another action and the Court refused
17 to lift the discovery stay. One of those is the
18 American Funds securities litigation from the
19 Central District of California. And one
20 important issue there is that the Court found no
21 undue prejudice that would result from the
22 documents not being produced, because they have
23 been produced to a government agency, presumably
24 they wouldn't be lost and there were no

1 disclosure issues. So again, we don't have the
2 irreparable harm situation that we have here.

3 Fannie Mae was also similar. And
4 in that case the Plaintiffs sought production of
5 documents that had been produced to a government
6 entity and the Court again refused to lift the
7 stay because there wasn't a disclosure issue,
8 there wasn't risk of the documents either being
9 destroyed or some sort of irreparable harm that
10 result from an informed vote.

11 THE COURT: Sounds like what
12 you're suggesting is that in just about any case
13 in which there has been a prior state court
14 production and in which a plaintiff like you
15 makes a claim on the PSLRA, it's going to be
16 either followed up with a PI motion or a PI
17 motion has already been filed, in just about any
18 case there would be undue prejudice. Is that
19 right? I mean is what you're asking for kind of
20 almost a de facto rule that just about any case
21 like this under these circumstances undue
22 prejudice has been met and the docs would have
23 to be produced?

24 MR. FARRELL: I wouldn't say every

1 case, because we still have to show our burden
2 that we stated the claim, right? So it's not as
3 though we simply file the claim and we
4 automatically get discovery. We still have to
5 show there's an underlying disclosure issue
6 under federal securities laws.

7 THE COURT: We're not even there
8 yet, right? I mean, we're not even going to get
9 to have you stated a claim, is their motion to
10 dismiss valid? We're not going to get there for
11 a while. So I guess I'm trying to figure out,
12 you know, you see the cases with regard to undue
13 prejudice and you know, some, as you say, like
14 Kneiting or Kneiting, and the Enron case go one
15 way and then cases that the Defendants cited,
16 including the ones you mentioned, but also
17 particularly cases like Lusk and Dimple, they go
18 the other. And I'm trying to figure out, is
19 what you're suggesting that there's a particular
20 factual scenario going on here that makes this
21 case maybe a little different than some and
22 shows that we've got undue prejudice here in a
23 matter that wouldn't necessarily be the case in
24 just about any kind of procedural situation like

1 ours? Or no, is it basically any case that kind
2 of fits our procedural situation you're going to
3 get the docs and undue prejudice is going to be
4 shown?

5 MR. FARRELL: Well, I think you
6 need to be able to show, as I mentioned, that
7 you actually have some sort of disclosure issue
8 and I want to go through some of the crucial
9 disclosure issues and why it's relevant here.
10 One thing I'll point out like in Dimple, as you
11 mentioned, one of the reasons the Court denied
12 was there was form shopping going on, because
13 the Plaintiff's action filed in State Court
14 initially and then chose after the fact to go to
15 Federal Court. And so that's factually
16 different. And the Lifetime Fitness case there
17 was not a situation where one plaintiff group
18 was getting ahead of the other plaintiff's
19 group. That's what we have here where the New
20 York plaintiffs are getting ahead of us. And
21 Lifetime Fitness, that's the 2015 District of
22 Minnesota case. I believe that is Lusk. I
23 don't have the plaintiff name in front of me.

24 But I'd like to kind of focus on

1 some of these disclosure issues to help Your
2 Honor understand what we're focused on here is
3 one of the things they do in the proxy is they
4 disclose the range that was -- of indication of
5 interest by potential purchasers. You had
6 KeyCorp, Party A and Party B. And the range
7 they list is \$10 to \$11.50. At the end of the
8 day, though, they get to an implied value,
9 because this is a cash of stock transaction of
10 \$11.50, so 10 cents under their range. But we
11 don't know if KeyCorp was at the top, Party A
12 was at the top, Party B was at the top. Whether
13 only one as at \$10 and maybe two were at \$11.50.
14 And the case law is very clear, and especially
15 in Orchard, granted it's stay for a chancery
16 decision, but they do require the disclosure of
17 the specific indications of interest. And
18 that's very important for stockholders to
19 understand, because if Party B was the one
20 offering \$11.50 but they chose not to do it,
21 then this range is kind of misleading because
22 when you look at it you think oh maybe it was
23 KeyCorp because they got to the highest number
24 at the end of the day.

1 And where is that information
2 going to be? It's going to be in the board
3 minutes or presumably it's going to be in the
4 banker books and those are documents that we
5 want. The other thing --

6 THE COURT: In other words, am I
7 right that you think among the documents that
8 have been produced in the New York State actions
9 are going to be documents that would further
10 flush out the nature of the claims you're making
11 in your complaint; is that right? In other
12 words, you're alleging that certain information
13 that should have been included was omitted in
14 the particular proxy statement you focus on and
15 then perhaps the definitive proxy statement too,
16 and you'd like to get your hands on information
17 that fills in some of those factual blanks to
18 help support your preliminary injunction motion
19 that's forthcoming; is that right?

20 MR. FARRELL: Right. We're trying
21 to prepare for the preliminary injunction
22 motion, but it's more than just that it was
23 omitted. I believe the information is necessary
24 in order to make the existing statements not

1 misleading, which is important for a Section 14A
2 claim. And so, my focus here is on the
3 preliminary injunction motion, that's why
4 there's irreparable harm, because it's very
5 difficult to fashion a damages remedy for a
6 disclosure violation. In some instances the
7 Court of Chancery has used the approach of a
8 quasi appraisal remedy, but that's not well
9 established in the Federal Courts and it's very,
10 very difficult to say what is the loss
11 associated with not knowing the offer prices. I
12 don't even know where to begin on that. And
13 that's why it's important that be addressed at
14 preliminary injunction phase. And again we're
15 seeking a very narrow set of documents that
16 should have no burden on Defendants to produce.

17 THE COURT: I guess, you know,
18 when I asked you what kind of makes this case
19 different than maybe lots of other cases that
20 might, that may fall into this same procedural
21 scenario, the thing you said a couple times is
22 well, we still have to show or demonstrate that
23 our claims, you know, that our claims of
24 misleading or the disclosures or disclosures

1 that omit information, I forget the word you
2 used, but I think the gist was, we have to show
3 that our claims had some basis to them. And I
4 guess what I'm asking is, you know, we're at a
5 procedural stage in which I won't be making that
6 call. I won't be determining before I decide as
7 to whether you get expedited discovery or even
8 perhaps before a preliminary injunction motion
9 is actually fully teed up. I won't be deciding
10 at this stage when I'm considering your
11 expedited discovery motion whether or not those
12 claims do have basis. For all I know, they
13 might ultimately be, a motion to dismiss might
14 ultimately be granted here. I guess my question
15 is, how am I supposed to tell that this is a
16 kind of case where your claims have basis when
17 I'm not going to be going through the motion to
18 dismiss process that the PSLRA contemplates
19 happens in a case?

20 MR. FARRELL: I think that's where
21 Rule 26 comes into play, because Rule 26, one of
22 the factors they do look into in whether to
23 grant expedited discovery is whether you stated
24 an underlying claim. So I do think that would

1 be something appropriate for the Court to
2 consider, because there are kind of two issues
3 here; one, should the discovery stay be lifted,
4 but then we also do have to get past Rule 26
5 still. But I think the discovery stay standard
6 of the PSLRA is very high. But to the extent
7 Your Honor has concerns about not being able to
8 look into it, I think that's perfectly
9 appropriate under Rule 26 for the Court to do.
10 So you know, to Your Honor's concern that what
11 if these don't have any merit to them, I think
12 you can look at that now and consider that as a
13 factor, and that's why I'm going to talk about
14 some of these, what I view as important
15 disclosure issues in this case.

16 THE COURT: And before we get
17 there, let me just make sure I understand.
18 You're suggesting that the Rule 26, the process
19 for deciding whether or not discovery should be
20 expedited pursuant to the restrictions of Rule
21 26 would have me, depending how likely I am, to
22 ultimately be determining whether there's merit
23 to these allegations in the complaint?

24 MR. FARRELL: I believe that's one

1 of the factors that is considered and evaluated
2 under Rule 26 and I believe that's also pointed
3 out in Defendant's brief. Give me one moment.

4 THE COURT: I just want to make
5 sure I know which portion of the test as to Rule
6 26.

7 MR. FARRELL: Sure.

8 THE COURT: I mean, for example,
9 on Page 12 of the Defendant's brief, they
10 reference the reasonableness standard, the
11 second test, which I said I think is the
12 appropriate test to use in these circumstances,
13 not the Natarro test. And they consider factors
14 as to whether there's a preliminary injunction
15 hearing, what's the need for discovery and
16 what's the breadth of the party's request. And
17 I'm just not sure I'm understanding --

18 MR. FARRELL: Sure. What I'm
19 referring to is on Page 12 of the Defendant's
20 brief and it's referring to the Natarro test.
21 And looked at four factors, the first is
22 irreparable injury, the second being some
23 probability of success on the merits.

24 THE COURT: Okay. I understand.

1 MR. FARRELL: So that's what I'm
2 referring to there. And they talk about it in
3 their brief in the context of Rule 26, Section F
4 specifically.

5 THE COURT: I get it. In a
6 previous decision I have determined that I don't
7 think the Natarro test is the appropriate
8 test under these circumstances in Rule 26 that
9 should be a reasonableness test, but I see where
10 you're pointing to. I got it. That's a
11 decision on a case called Kone from I think
12 2011. Okay. Lastly, before I let you move on,
13 you mentioned I think one of the issues that
14 Defendants raise, which is look, there are going
15 to be other remedies here for shareholders of
16 the kind the Plaintiff represents, one of them
17 is the appraisal process through Section 262, I
18 think it is, of the Delaware corporation law.
19 Isn't that a remedy that a shareholder to
20 descends as to the merger could pursue in state
21 court?

22 MR. FARRELL: Certainly appraisal
23 is one remedy that can be pursued, but that
24 assumes that stockholders have sufficient

1 information to determine whether to pursue that
2 remedy. And one of the things you need to know
3 in determining whether to pursue that remedy is
4 well, was the process sufficient, because the
5 Court Chancery in several appraisal decisions
6 including the Ancestry decision very recently by
7 Vice Chandler Glascock. He considered the
8 transaction process, but several others have as
9 well. But it's also important to look at the
10 banker analysis, understand it fully in order to
11 say hey, I think this deal's undervalued or it's
12 not. So you need to get past the first hurdle
13 of being sufficiently informed so you can decide
14 whether to exercise those appraisal rights.

15 THE COURT: I guess that
16 shareholder, presume this case moves forward and
17 presume it's meritorious enough to get past the
18 motion to dismiss stage, here we're going to
19 have discovery produced in a case. And
20 presumably shareholders, I mean shareholders
21 that are participating in such state court
22 actions, they're are going to be the ability,
23 right, to have that kind of information in some
24 way and use that through this appraisal process,

1 aren't they? Isn't that another option that
2 they have, a way to seek redress other than
3 through using this kind of discovery vis-a-vis
4 your preliminary injunction motion?

5 MR. FARRELL: Well, see if I can
6 hopefully answer Your Honor's question fully.
7 Again, my point here is that they need to have
8 the information to decide whether in the first
9 place to seek appraisal. Because remember,
10 under the appraisal statute, you're not
11 guaranteed the transaction price. You're
12 running the risk of getting below the
13 transaction price and that's happened in not so
14 recent decisions, so you need to be fully
15 informed in deciding whether to seek appraisal.
16 And some of these issues that we're raising go
17 specifically to the company's value in the
18 banker's analysis. One of those is with the
19 inconsistent use of multiples. And one of the
20 things they do is they do a comparable company's
21 analysis. You look at the other companies, look
22 at the multiples they are trading at and you
23 compare it to the target and you come up with a
24 value based on that.

1 In the discounted cash flow
2 analysis, throughout the perpetuity period,
3 there are two different models you can use. One
4 is called the Gordon growth model, where you
5 apply a specific growth rate into perpetuity,
6 that's a projection period you're valuing the
7 company. The other one you can use what's
8 referred to as terminal multiples. And often
9 times what bankers do in determining those
10 multiples, what they usually do is look at the
11 comparable company's analysis and they will
12 import those multiples and use that during the
13 terminal period for the DCF analysis. But here,
14 for unexplained reasons, they used a lower
15 number which lowered the DCF value than what
16 they used for the comparable companies. And so
17 the bankers need to disclose, so the
18 stockholders can be fully informed, why they did
19 that inconsistent usage.

20 The other thing that stockholders
21 are denied are projections for the buyer. This
22 is a cash and stock transaction. Without the
23 projections for the buyer, you don't know what
24 the buyers, you know, real value is and we know

1 that the buyer's financial advisor did, in fact,
2 receive projections, so there's a vacuum
3 information there.

4 THE COURT: I guess all I'm asking
5 about this line of questioning is, I'm trying to
6 determine other bases of relief. If I'm an
7 aggrieved shareholder, if I believe I really
8 have I don't have it and didn't see in this
9 preliminary proxy statement and ultimately the
10 definitive proxy statement information that I
11 should see, that I should know, that I should
12 have the ability to consider before I make an
13 informed choice on this important merger
14 decision, one way to effectuate that
15 shareholder's rights would be to, I suppose, to
16 grant you expedited discovery here, presumably
17 some of the information or a lot of it that
18 you're seeking is in fact found in the discovery
19 that's been provided in other State Court
20 actions. On behalf of this representative
21 shareholder, you can file a preliminary
22 injunction motion and that if successful that
23 could stop the merger. But I'm asking, let's
24 say that doesn't happen. Merger goes through,

1 but I'm an aggrieved shareholder, I don't think
2 the merger should have gone through. What
3 options do I have? Do I have other options for
4 redress? Isn't it possible that ultimately I
5 will get my hands on these kinds of documents
6 you're talking about and I would be able to use
7 some of those documents through the Section 262
8 process that the defense described or isn't it
9 possible that in this very case, again, let's
10 say the preliminary injunction motion is denied,
11 but aren't you seeking other remedies, remedies
12 with respect to damages and remedies with
13 respect to decision. Aren't those other options
14 that an aggrieved shareholder would have other
15 than getting the expedited discovery now and
16 trying to win a preliminary injunction motion
17 based on that discovery?

18 MR. FARRELL: Sure. I guess you
19 could say there are three different avenues.
20 One is in this Court. Yes, you're right. We do
21 have the complaints. There are damages claims,
22 but I believe, as I've pointed out in the case
23 law, proving damages is going to be very, very
24 difficult in a disclosure case. Another avenue

1 they have is the Future Lou litigation that's
2 going on in the State of New York and also in
3 Delaware, but that's a different standard,
4 because in order to obtain money damages you're
5 going to have to overcome 102(b)(7) and show bad
6 faith at the end of the day. You know, unless
7 someone gets creative with other arguments that
8 would somehow get around 102(b)(7), but I'm not
9 aware of them in that action. And the other
10 action is appraisal, but again, the problem is
11 they are not fully informed and they run the
12 risk of getting below the transaction price. So
13 I just think that the best option here is for
14 this to be addressed at the outset and
15 appropriately and then it can be dealt with
16 disclosures. We don't have to get into a
17 measure of damages. It's much more simplistic
18 and the way certainly the Court of Chancery has
19 repeatedly preferred it. And simply because
20 there's -- let's say they are the same claims
21 that happened in state and federal court,
22 doesn't necessarily follow that the state court
23 is going to deny relief and rather that the
24 federal court is going to deny it and the other

1 court is going to grant it. And I'll point Your
2 Honor to what I referred to as the MySpace case,
3 often referred to as Intermixed Media at the
4 time. And that was the Central District of
5 California, and the case is Brown versus Brewer.
6 It's 2010 US District Luxus, 60863. It's a 2010
7 decision. And there the federal claims actually
8 went forward past summary judgment. My memory
9 is it settled before then, but the state claims
10 ended up going nowhere. They were appealed to
11 an appellate court in California and were shot
12 down. So it's certainly there are examples out
13 there where federal claims have gone forward and
14 state disclosure claims have not.

15 So I think it's important that,
16 you know, we treat this as an independent case.
17 And I think we have stated, you know, some real
18 disclosure issues. Another one is to Your
19 Honor's point about the appropriateness of
20 another remedy is again the projections, because
21 in determining whether to seek appraisal, it's
22 very important that you understand how reliable
23 the projections are. And there's plenty of
24 cases that say well, the bankers projections are

1 far less reliable than what management does.
2 But what the proxy says, says there's some
3 projections that are done by management and then
4 other times they use language that the
5 projections were prepared at the direction of
6 management, which these open the question for --
7 to make sure the statements aren't misleading,
8 are there two sets of projections or did
9 management create them or when I hear the
10 language at the direction of management, that
11 suggests to me there was some sort of banker
12 involvement or third party, which if I'm the
13 stockholder, I'm going to give less weight to
14 those. So if you're trying to seek appraisal,
15 you need to understand what weight to give them
16 because at end of the day at the Court of
17 Chancery, especially very recently has relied
18 very heavily on discounted cash flow analysis
19 and a key input to that is the projections and
20 your assumptions during the perpetuity period,
21 which we've also raised concerns about from a
22 disclosure standpoint.

23 THE COURT: In an appraisal action
24 of the kind that defense of cited, are there not

1 mechanisms for those pursuing it to obtain the
2 kind of information that you're suggesting one
3 would need to make an effective case?

4 MR. FARRELL: You can obtain it
5 once you file, but once you get past the waiting
6 period where you can get the deal price
7 considered back again, you're running the risk
8 of getting below the transaction price and you
9 need to make that cost benefit decision up
10 front. You know, a fully informed decision of
11 hey, I want to seek appraisal versus you get in.
12 And this happens in these cases all the the time
13 where the company tries to walk away from the
14 projections. I actually was on the defense side
15 of a case one time where we successfully had
16 some of the projections reduced downward based
17 on a closer look. So if you're a stockholder
18 trying to determine whether to seek appraisal, I
19 think you need to understand how reliable those
20 projections are so you can decide whether you
21 want to seek appraisal or not or on the back end
22 you're going to end up with a different
23 projection set, because it wasn't reliable
24 because a banker did it or whatever reason. And

1 here we need to understand the reliability of
2 those projections and whether management did
3 them or someone else.

4 THE COURT: I guess the background
5 to some these questions about alternative remedy
6 is, if the test was just, or if if we were
7 dealing in a world in which it was just what's
8 the most efficient way for a shareholder like
9 the Plaintiff to get access to information
10 through this federal case and to try to bring
11 things to a head, that might be one thing. But
12 I think, you know, underlying some of the
13 decisions is the idea that look, in general.
14 I'm summarizing, but the PSLRA says in essence
15 in the main when these cases are filed, these
16 particular kinds of federal cases are filed,
17 we're not going to permit -- we're a little
18 worried frankly about Plaintiffs filing these
19 cases without already having a sufficient bases
20 to overcome a motion to dismiss. So in the main
21 we're not going to permit discovery, because we
22 want to make sure that a plaintiff can get over
23 that motion to dismiss hurdle. On this case,
24 right, if you look at what's happened, you

1 filed, Defendant filed a motion to dismiss. You
2 didn't answer it. Now, maybe there was some
3 back and forth between counsel about there being
4 extended briefing period, but we still don't
5 have an answer from you as to that. But yet
6 what you're doing here is trying to get the
7 discovery that you're not entitled to in the
8 main in this kind of case because the whole
9 structure is meant to say can you get over a
10 motion to dismiss. But why aren't you trying to
11 do an end run around that, you know, we're going
12 to get that anyway, because we're going to tell
13 them we're going to file a PI motion and then
14 we're going to ask for expedited discovery. Why
15 isn't what you're doing, if I were to grant your
16 motion, basically permitting an end run around,
17 you know, what Congress was trying to prohibit
18 with the discovery stay provisions of the PSLRA?

19 MR. FARRELL: I don't think it's
20 really an end run. If Your Honor's question is
21 about answering a motion to dismiss, we're happy
22 to respond as quickly as Your Honor wants if you
23 believe that needs to be teed up.

24 THE COURT: Did you all discuss

1 before that your deadline for response to the
2 motion to dismiss is that you would have an
3 extended briefing period or did you all just not
4 file a response as to the date it was --

5 MR. FARRELL: Unfortunately, I
6 wasn't involved in those discussions, but I
7 believe there was a request for an extension of
8 time and that was granted by Defendants. But
9 defense counsel, I assume she was involved in
10 those discussions directly, I don't want to
11 speculate.

12 THE COURT: Okay. You know what
13 I'm asking. You know, it could seem like what
14 you're trying to do is let's put off a decision
15 on this motion to dismiss, which again the
16 statutory structure kind of suggests in the main
17 should happen first before discovery occurs.
18 Let me trying to get discovery that I'm not
19 otherwise entitled to in the case by way of this
20 kind of procedural thing that you're attempting
21 here. Why isn't that kind of end run around, I
22 mean in the way that Dimple talked about, an end
23 run around what the PSLRA is trying to
24 accomplish?

1 MR. FARRELL: I mean, I think it's
2 kind of a prisoner's dilemma here, in that you
3 could flip it the other way and say well, if
4 that's the law in all of these merger cases
5 where they happen very quickly like, a tender
6 offer, then you could never proceed to
7 preliminary injunction motion simply because
8 there's not enough time to brief the motion to
9 dismiss fully and for Your Honor to write a
10 decision on it. And so again, this is a narrow
11 situation. This isn't a broad situation. We're
12 seeking very narrow discovery that was already
13 produced in another action, so we have other
14 plaintiffs that are on unequal footing. And
15 then add on top of it, I understand that Your
16 Honor disagrees with the appropriate tasks, but
17 I think it would be appropriate to look into the
18 materiality of these disclosure issues and that
19 would again provide another safeguard to the
20 Court of, you know, is this really a fishing
21 expedition or not.

22 THE COURT: And last question here
23 is, and this I think goes to the question of
24 well, you suggested look, there just wouldn't be

1 a mechanism otherwise. We couldn't get this
2 expedited discovery in this format. You'd
3 almost never have a chance to get it. I think
4 the other side might say not necessarily. Look,
5 there may be cases in which expedited discovery
6 in these kind of circumstances are granted, but
7 in those kind of cases the defendants say there
8 were some different things happening, some
9 extraordinary things. I mean cases like in re
10 LeBranch, in re WorldCom. They pointed to
11 courts that have distinguished those cases,
12 saying they were case where in one of them, for
13 example, where a court had ordered that parties
14 including the parties seeking expedited
15 discovery participated in expedited settlement
16 discussions. And so almost necessarily in that
17 circumstance, in order to fully participate in
18 these court ordered settlement discussions you
19 had to get the discovery to know what you're
20 talking about. I think what the Defendants are
21 actually saying is no, no, there are some
22 circumstances, maybe rare, but some in which a
23 Plaintiff like this Plaintiff could get this
24 discovery early and right now it's just this

1 case doesn't implicate any of those. I guess
2 what I'm wondering is it sounds like you
3 disagree that this case doesn't have those kinds
4 of circumstances present. I'm wondering what
5 you think about the case makes them similar to
6 cases like WorldCom and LeBranch.

7 MR. FARRELL: I think that what
8 makes them similar is the irreparable harm issue
9 that results from an uninformed vote. And to
10 Your Honor's point, why didn't we respond to the
11 motion to dismiss and why couldn't we have dealt
12 with this earlier, there's a major procedural
13 problem here that the law imposes. Defendants
14 point this out in the brief. Here's the
15 problem. Under Fara versus Blankenship, which
16 is a Western District of Texas case, the Court
17 held Plaintiffs can't state a 14A claim until
18 the definitive proxy is filed. And they have
19 argued that as a basis for their motion to
20 dismiss. So here a preliminary proxy is filed
21 on November 30th. We come in to Court, try to
22 fight the motion to dismiss, we lose, because
23 there's no definitive proxy under the law. So
24 we're stuck waiting. And so we wait until

1 February 4th, very recently, right, that's when
2 the definitive proxy comes out. Now we've got a
3 vote date here that's coming up very soon, March
4 23rd. There's simply not enough time between
5 February 4th and March 23rd to fully brief a
6 motion to dismiss. And that's a situation
7 that's repeatedly is going to come up in these
8 cases. And then because the law makes us wait
9 for a definitive proxy, we have to wait, but
10 then once we wait, they say we're too late. So
11 which is it. We lose if we file early, we lose
12 if we file late. That shouldn't be the law.

13 THE COURT: Okay. Mr. Farrell,
14 you're over 30 minutes. I'll give you five
15 minutes of rebuttal.

16 MR. FARRELL: I'd appreciate that.
17 Thank you.

18 THE COURT: Let's hear from Ms.
19 Oswell from the other side.

20 MS. OSWELL: Good morning, Your
21 Honor.

22 THE COURT: Good morning.

23 MS. OSWELL: Your Honor, I think
24 many of the key points were covered in the

1 Plaintiff's argument, but just to be clear,
2 there is nothing unusual or extraordinary about
3 this case. This is one of many cases that
4 Plaintiff's counsel and counsel like them file
5 now every time a merger of any size is
6 announced. And because of that, if Plaintiffs
7 were to be successful here in overcoming the
8 PSLRA stay, it would essentially change the
9 rules of how the PSLRA applies.

10 And the fact is here Plaintiffs
11 made several litigation decisions that have
12 resulted in the situation they find themselves
13 in now. First is they chose to file in Federal
14 Court. They chose to file a federal securities
15 claims. They know that the PSLRA applies to
16 those claims and would present a challenge to
17 them obtaining discovery. Then, we filed a
18 motion to dismiss very early as the Court noted.
19 We gave them every opportunity to respond to
20 that motion to dismiss in order to move things
21 along and overcome the limitations under the
22 PSLRA of obtaining discovery. Counsel
23 referenced the definitive proxy that's now been
24 on file for over three weeks. Plaintiffs have

1 yet to file an amended complaint. So it is
2 their decisions here that are causing the
3 challenge that counsel identified, not the law
4 and it's not undue prejudice. To find so would
5 essentially be to find that in every case where
6 a shareholder files what some would qualify as a
7 strike suit under the federal securities laws
8 that the PSLRA stay must necessarily be lifted.
9 And that would be directly contrary to
10 Congress's intent.

11 Now, as we just noted in our
12 brief, this is a mandatory stay under the
13 statute. And the first question that the Court
14 must answer or must look to is whether the
15 lifting of the stay is consistent with the
16 statutes purpose. And as we -- as we heard from
17 Plaintiff's counsel, what they are trying to do
18 here is exactly what the statute says the
19 Plaintiffs may not do. They are looking for
20 information in order to substantiate their
21 claims and as many courts around the country
22 have found, when Plaintiff sues without the
23 requisite information, that is exactly when the
24 PSLRA stay is meant to apply. Indeed in the

1 Central District of California in the American
2 Funds securities litigation case, the Court
3 found that the attempt to use information in
4 discovery to bolster claims is in direct
5 contravention of one of the key purposes of the
6 PSLRA stay. Moving on to the next question --

7 THE COURT: Actually, can we go
8 back?

9 MS. OSWELL: Sure.

10 THE COURT: To get to some of what
11 Mr. Farrell's concerns were and about timing
12 really of the way these things might go. You
13 know, it's -- let's assume you have a plaintiff
14 who waits until the definitive proxy is filed
15 which happened when?

16 MS. OSWELL: February 4th.

17 THE COURT: So February 4th.
18 Relatively recently. It's going to be a
19 shareholder vote less than two months later.
20 Probably wouldn't be the case -- look, anything
21 is possible, but a motion to dismiss would have
22 to be, you know, severely, you know, truncated
23 in order to have a decision before that vote.
24 And what Mr. Farrell is suggesting, if you

1 didn't allow expedited discovery in at least
2 some cases like this in advance of or consistent
3 with the PI motion, you wouldn't -- you wouldn't
4 be able to effectuate a decision here in this
5 Federal Court case that might have the ability
6 to put off that vote. What's your response to
7 that? Is part of the response that well, look,
8 we're not denying that someone could file a
9 preliminary injunction motion in this kind of
10 case and we're not denying even that in some
11 circumstances expedited discovery in advance of
12 that motion could be warranted, we're just not
13 saying this is that case?

14 MS. OSWELL: Your Honor, that is
15 the answer in this case. But more than that, I
16 would say that that's exactly what the PSLRA
17 means, that that is exactly what the statute
18 says, that you don't get that discovery. And
19 what you've heard from Plaintiff is, in fact, he
20 doesn't actually need it. They've outlined in
21 their brief and extensive footnotes and here
22 today at argument, all the different things that
23 they think are omitted from the proxy. And
24 whether that is, those things are omitted and

1 they are required to be disclosed as a matter of
2 law is a completely different questions. That
3 argument is made irrespective of whether
4 Defendants have that information or Plaintiffs
5 have received that information. Those are
6 arguments as a matter of law as to whether the
7 information that Plaintiffs allege to have been
8 improperly omitted was, in fact, omitted and was
9 required to be disclosed. So it doesn't impact
10 the preliminary injunction motion in the way the
11 Plaintiff has described. But moreover, in this
12 case we are not even close to there yet, because
13 Plaintiffs have not filed an amended complaint
14 based on the definitive proxy. In fact I
15 believe the Plaintiff's counsel just admitted
16 that there's no way the complaint that they have
17 on file would withstand a motion to dismiss. So
18 critically here we're not even at that stage.
19 And it's difficult for Plaintiffs to credibly
20 claim that they would be prejudiced somehow when
21 they are ready to move forward with the
22 preliminary injunction motion and where there
23 are claims pending in another court addressing
24 exactly the same disclosure issues that would --

1 that deal with this circumstance on behalf of
2 the same class of shareholders.

3 THE COURT: And on that front, if
4 we're talking about the New York State actions,
5 for example, I mean, I was asking questions
6 about like, for example, the documents that
7 Plaintiffs are seeking, how many documents are
8 we talking about?

9 MS. OSWELL: Your Honor, I don't
10 have the exact number. I would tell you that
11 Plaintiff's counsel is right. It's a very small
12 number, somewhere between 15 and 20 documents.
13 It's a narrowly described set of documents.

14 THE COURT: And you mentioned in
15 essence the nature of the claims at issue in the
16 state court proceeding, albeit different kinds
17 of claims, you know, will tee up some of these
18 issues and may tee up faster than they occur in
19 this case in some ways. But wouldn't a part of
20 your brief on the particularization front kind
21 of tell me that these two kinds of claims, the
22 Future View claims in State Court and these
23 PSLRA claims are different and that I couldn't
24 suggest that the kinds of docs that are going to

1 be sought here really might, in fact, be
2 relevant to the Plaintiff's claims in this case?

3 MS. OSWELL: That's right, Your
4 Honor. And let me explain the difference. So
5 in terms of what is teed up at a preliminary
6 injunction motion, those claims will be
7 essentially the same. They will be was what was
8 disclosed in the proxy adequate? Were the
9 things that Plaintiffs alleged to have been
10 omitted from the proxy, were they actually
11 omitted and were they required to be disclosed?
12 As I just mentioned, you don't actually need the
13 documents to make that claim of omission. When
14 these cases proceed or if they proceed past a
15 preliminary injunction proceeding, the claims
16 become very different. These are claims under
17 the federal securities laws. And what -- not to
18 jump ahead of ourselves, but what we've argued
19 in the motion and what numerous courts have held
20 is that these types of claims, these disclosure
21 claims that are based on a merger that really
22 amount to a breach of fiduciary duty don't
23 really fit within the federal securities laws.
24 But their case would be proceeding on the basis

1 of Section 14A, which is much different.

2 Whereas, the state court plaintiffs, when they
3 move forward, their cases proceed as a fiduciary
4 duty claim subject to all the Delaware rules as
5 Plaintiff's counsel described.

6 THE COURT: Would it be fair to
7 say that as they proceed forward, the nature of
8 the legal claims are of course different.

9 MS. OSWELL: Uh-huh.

10 THE COURT: The law regarding
11 those claims might present different challenges
12 in the different courts, but at base the
13 question of sufficiency of information that's
14 disclosed to shareholders is going to be an
15 important component of both sets of cases.

16 MS. OSWELL: Yes. And especially
17 at the preliminary injunction stage, which is
18 actually a reason not to permit these Plaintiffs
19 discovery, because those issues on behalf of the
20 same class are being litigated actively in the
21 New York State court. So there is no prejudice
22 to Plaintiffs here. There may be prejudice to
23 Plaintiff's counsel who have chosen this forum
24 in these types of claims, but there is no

1 prejudice to the shareholder plaintiffs who are
2 a member of the class.

3 THE COURT: Just so I understand,
4 why is the nature of the claims going to be
5 particularly similar as it relates to a
6 preliminary injunction motion in this case and
7 not necessarily to the ultimate decisions on the
8 Section 14A claims that are at issue in the
9 case?

10 MS. OSWELL: Because at the
11 preliminary injunction stage the question that
12 is being asked is whether the disclosure is
13 adequate and I believe that would be the same,
14 not to, you know, preview Plaintiff's motion,
15 which may cover other things, but I would
16 anticipate it would be the same disclosure issue
17 as is briefed, what we briefed in the state
18 court, because that is the basis on which you
19 may obtain a preliminary injunction. The
20 damages claims do not give rise to preliminary
21 injunction.

22 THE COURT: It really is this
23 irreparable harm issue. In other words, if we
24 don't allow this disclosure, it could be harmed

1 by this pending vote.

2 MS. OSWELL: Right.

3 THE COURT: Once the vote is out
4 of the way and this PI motion is out of the way,
5 one way or the other the underlying legal issues
6 in the case are going to focus more on
7 sufficient, you know, for these omissions that
8 were significant, are they misleading, et
9 cetera.

10 MS. OSWELL: That's exactly right,
11 Your Honor.

12 THE COURT: Okay. And I guess
13 lastly, and I'll let you move on, it almost
14 sounds like what you're saying on the flip side
15 is, I can't think of any case in which a
16 complaint like this is filed. And I say like
17 this, let's assume we're talking about, take out
18 the preliminary versus definitive proxy issue,
19 and talk about a complaint, similar kinds of
20 claims with regard to a proxy, sounds like
21 you're saying I can't think of almost any case
22 like this where a PI motion would be filed and a
23 plaintiff would actually be entitled to
24 expedited discovery. Is that what you're

1 saying?

2 MS. OSWELL: That's exactly right,
3 Your Honor. We are aware of no case like this,
4 this being a case based on a merger, disclosures
5 made in connection with a merger where the stay
6 has been lifted.

7 THE COURT: But we do know that
8 there are some cases in the federal system where
9 a PSLRA complaint is filed and expedited
10 discovery is permitted. Now, you attempted to
11 distinguish some of those cases. Do you want to
12 walk through for me why you think the cases that
13 have granted expedited discovery in advance of a
14 decision on a PSLRA complaint are different than
15 what you think the circumstances at issue here
16 are?

17 MS. OSWELL: Certainly, Your
18 Honor. They really fall into three categories.
19 The first is where the Court has identified the
20 prejudice. And this would include the case of
21 WorldCom, where the Court was dealing with an
22 underlying entity that was in bankruptcy. And
23 multiple types of cases, so the securities
24 claims, the ARISA claims, other claims were all

1 consolidated into a single action pending before
2 Judge Coate in the Southern District of New
3 York. And Judge Coate had ordered that all of
4 those parties engage in coordinated settlement
5 discussions. And again, against an entity with
6 a finite number of resources in bankruptcy. And
7 in that instance where the shareholder
8 plaintiffs were being essentially ordered to
9 settlement discussions with other plaintiffs who
10 did have access to that discovery, the Court
11 held that that was identified undue prejudice.
12 But we should note that in that opinion Judge
13 Coate said where is here plaintiffs are not in
14 any sense engaged in a fishing expedition or an
15 abusive strike suit and thereby do not act in
16 contravention of the fundamental rationales
17 underlying the PSLRA discovery stay and there is
18 no undue prejudice the stay may be lifted. So
19 the Court directly contrasted the situation we
20 have here where we essentially have a strike
21 suit to say this case is different, there's
22 something special here and discovery is
23 warranted.

24 Enron is a similar situation

1 although the opinion is kind of less, provides
2 less explanation of the basis for lifting the
3 stay. Again, a case where the underlying entity
4 is in bankruptcy and the Court has before it
5 several cases of different types, all
6 consolidated, including the ARISA actions, where
7 a bankruptcy stay has been lifted and the
8 plaintiffs are entitled, other plaintiffs are
9 entitled to discovery. In that case the
10 shareholder plaintiffs are at a disadvantage
11 because they're litigating a consolidated case
12 with plaintiffs raising different claims who do
13 have the discovery and the Court allowed
14 discovery there.

15 THE COURT: So you'd say if I'm
16 shorthanded in the distinction so far, in
17 WorldCom we've got court-ordered settlement
18 discussions in a consolidated case where not
19 only is the case consolidated, but the party and
20 the plaintiffs use here, is court ordered to
21 participate in the settlement and doesn't have
22 the same kind of documents that the other
23 parties do. In Enron, sounds like what you're
24 saying is at a minimum a consolidated case --

1 MS. OSWELL: Uh-huh.

2 THE COURT: -- in which the
3 plaintiffs are at an imbalance as to other
4 plaintiffs, not necessarily that the additional
5 aspect of court-ordered settlement involved.

6 MS. OSWELL: Exactly right.

7 THE COURT: But that's the
8 distinction.

9 MS. OSWELL: And I would note
10 against an entity with the finite resources. So
11 when you're a plaintiff seeking, raising claims
12 against an entity that's in bankruptcy
13 essentially, your resources are, or the
14 availability of recovery is limited, because
15 part of the estate, your dealing with insurers.
16 It's a much different situation that we have
17 here. Or you're litigating against a liquid
18 entity who is about to be acquired.

19 THE COURT: I don't have Enron in
20 front of me, but are you reading in some of
21 those? I don't think I remember the Court
22 necessarily explicitly distinguishing the
23 decision based on those factors.

24 MS. OSWELL: Right. It's the

1 background of Enron. When you read the full
2 opinion, I agree with Your Honor, the Court's
3 discussion of lifting the PSLRA stay is rather
4 abbreviated at the end of a long opinion about
5 summary judgement and other issues, but
6 understanding the background of Enron I think is
7 critical to understanding why the Court would be
8 willing to lift the stay there where it might
9 not be appropriate in other instances.

10 THE COURT: Now, a case like
11 Kneiting or Kneichting from the Southern
12 District of Ohio, is your argument there
13 basically, we think the case is wrongly decided
14 or that it relied on pre-PSLRA decisions or is
15 there some way you distinguish the result in
16 that case other than it was wrongly decided.

17 MS. OSWELL: It's wrongly decided,
18 Your Honor. It relies on a decision that
19 predates the PSLRA stay where the consideration
20 given to the undue prejudice was very minimal
21 because they weren't dealing with the PSLRA
22 stay. And when you read Kneiting, you see the
23 Court kind of give the same short shrift to the
24 undue prejudice question and to the motivations

1 of the Congress in enacting the PSLRA stay very
2 much unlike kind of the majority of the
3 decisions considering the PSLRA stay as such.

4 THE COURT: Also covering the
5 issue in a case like Lusk, one of the issues,
6 you know, in terms of determining whether
7 there's undue prejudice that the Court focuses
8 on is akin to some of your arguments here about
9 other remedies that a plaintiff like the
10 Plaintiff here and presumably the plaintiffs at
11 this point who represent might have. Now, Mr.
12 Farrell has talked about, for example, an
13 appraisal process through Section 262, the
14 ability to participate in state court actions
15 alleging breaches of fiduciary duty, like the
16 ones we've seen here, the ability to seek other
17 kinds of remedies in this very federal case,
18 that even if a preliminary injunction motion is
19 denied, part of the response from Plaintiff's
20 counsel is look, all of those options, sure,
21 they are options, but they've all got lots of
22 downsides to them, so they are not -- sure,
23 there are other options, but they are not really
24 comparable options. Do you want to talk

1 about -- is your response there, I disagree,
2 actually I think they're great options? Or no,
3 I may acknowledge they may be hurdles, that's
4 not the point. The point is are there other
5 avenues, and there are? Which are you arguing?

6 MS. OSWELL: Maybe a little bit of
7 both. Those are other avenues. Those are
8 avenues that are available to these plaintiffs
9 here. And moreover, Plaintiffs have made the
10 choice to be in federal court where they knew a
11 stay would apply. If they wanted to litigate a
12 case where they could have access to those
13 documents and could proceed without surviving a
14 motion to dismiss, they should have filed in
15 state court and they should not have filed
16 federal securities claims. The fact is to the
17 extent there is a challenge here, it's because
18 of the way Plaintiffs chose to proceed. That
19 choice does not somehow create undue prejudice.
20 Essentially what Plaintiffs are saying here is
21 that they should be allowed to overcome the
22 PSLRA stay simply by virtue of bringing these
23 claims here, which is exactly the opposite of
24 what the statute says.

1 THE COURT: I mean Lusk in
2 particular cited to, so does statute asserted to
3 be somewhat akin to Section 262 and noted that
4 that does provide another remedy for a
5 shareholder alleging that a share price offered
6 in the proposed transaction is unfair. You
7 particularly said Section 262 is one of these
8 other options. Can you walk through for me how
9 you would say look, this is the way that process
10 would work and admittedly a different process,
11 one that may have up sides or down sides, but
12 it's an option? Tell me why you cited that
13 option and tell me why it's something I should
14 consider in the same way that the Lusk court
15 considered that Minnesota statute?

16 MS. OSWELL: Certainly. It is the
17 predominant other option that shareholders in
18 Delaware have. It's disclosed in the proxy.
19 The process is disclosed in the proxy.
20 Shareholders have full rights to proceed under
21 that statute if they think that there is
22 something improper about this case. And again,
23 that's another alternative in addition to claims
24 that are being litigated on their behalf with

1 the benefit of this information in New York. So
2 they have multiple options. And I mean, many
3 courts in Delaware, you know, permit or the
4 appraisal statute in Delaware is a standard way
5 that Plaintiffs presented with a situation that
6 the Plaintiffs here claim may arise, where they
7 feel that the merger is unfair, proceed. It is
8 the ultimate remedy. And to kind of go back to
9 the statute, that's not the standard here. The
10 undue prejudice question isn't do you have
11 another available remedy. It's certainly
12 something to consider. And the fact that there
13 are multiple other avenues here and multiple
14 other ways the Plaintiffs could proceed with
15 these claims, even these Plaintiffs here, had
16 they chosen to litigate this case more actively
17 instead of filing a complaint that they knew was
18 inadequate and doing nothing else other than
19 moving to try to lift the stay without doing the
20 things that are required to essentially warrant
21 lifting the stay, those avenues certainly negate
22 undue prejudice. But the absence of those
23 avenues is in itself not undue prejudice, it is
24 the circumstance of the PSLRA stay as it was

1 intended by Congress.

2 THE COURT: Okay. I've asked a
3 lot of questions. Let me let you -- you have
4 about five, little more than five minutes left.
5 Let me let you make some other points that you
6 want to make.

7 MS. OSWELL: Your Honor, I think
8 we've probably covered most of them. The key
9 points here are we have to go back to the
10 statute. Plaintiffs have made a number of
11 arguments relating to the claims that they'd
12 like to bring, the arguments that they might
13 bring in a preliminary injunction motion. They
14 haven't done what the statute requires in order
15 for them to obtain discovery. It is not
16 consistent with the statute's purpose.

17 THE COURT: But you cited that
18 it's language, I think, from Dimple, relying on
19 the prior EPA case suggesting that in both these
20 extraordinary circumstances, that kind of
21 language isn't really found in the statute, may
22 not be applicable here. Do you have a response?

23 MS. OSWELL: It's how the courts
24 have interpreted that language, based, I

1 believe, on the kind of different considerations
2 that are required, including the intent of
3 Congress and the undue prejudice. Looking at
4 those two factors, I think that results in a
5 situation where it requires something
6 extraordinary, meaning out of the ordinary.
7 This case could not be more ordinary. In fact,
8 it is one of multiple strike suits that are
9 filed like this upon the announcement of every
10 merger of any size. This is perfectly ordinary.
11 So the extraordinary standard, yes, it is what
12 courts have said, it is based on the analysis
13 under the statute. Perhaps it's a bit of a
14 shorthand, but that's the right way to look at
15 it. And Plaintiffs are nowhere near that here.

16 And it's the Plaintiff's burden.
17 It's a heavy burden and I think that that is
18 evidence in the extraordinary circumstances
19 standard. And we've cited in our briefs, there
20 are multiple cases that Your Honor has discussed
21 and some that we've said in our briefs where
22 courts refused to lift the stay even where
23 Plaintiff's are not actively litigating another
24 case in another forum raising similar claims

1 with the documents that Plaintiffs claim they
2 need here. So it's even more so in this case
3 that there is no undue prejudice. It isn't
4 extraordinary, because these claims are being
5 litigated elsewhere. And I would say that the
6 stay and the kind of intent behind the stay is
7 particularly important here where we have a
8 complaint that Plaintiffs have essentially
9 admitted will not survive a motion to dismiss
10 and they have not bothered to amend. Putting
11 aside whether we could get through a motion to
12 dismiss briefing schedule kind of in time and I
13 would say in my experience we could if we needed
14 to, they haven't taken any of the steps that we
15 required to make that argument, to make the
16 argument that well, we can't get through it,
17 because they haven't filed that amended
18 complaint despite having over three weeks with
19 the definitive proxy.

20 There is simply no undue prejudice
21 and I think the key thing here, as many courts
22 have explained, is the fact of being
23 disadvantaged, even disadvantaged with respect
24 to other plaintiffs by virtue of the stay is not

1 undue prejudice. It is prejudice arising from
2 the statute exactly as it was designed. And as
3 you've said, there are a multitude of other ways
4 that shareholders may and in fact are pursuing
5 their rights here to the extent that there is
6 some issue with the disclosure.

7 Moving on, the one thing that the
8 Court asked and I think that the Plaintiffs have
9 focused on is the notion that well, there aren't
10 that many documents, so what's the big deal
11 here? And you know, the Court in American Funds
12 recognized that there is prejudice and there
13 would be particularly here given the
14 circumstances of this very ordinary case. In
15 rejecting essentially the statute's purpose and
16 saying that Plaintiffs get discovery here and
17 going against the statute, there is prejudice to
18 the Defendants. And the real issue, the real
19 answer is that it's irrelevant, as courts like
20 Sarantagus in the Northern District of Illinois
21 and CrayCos in the Southern District of New York
22 said it doesn't matter whether there's five
23 documents or 5,000 documents, it just doesn't
24 matter because that's the question asked by the

1 statute. The statute doesn't say you can't get
2 a lot of discovery, you can't get millions of
3 pages. It contains no exception based on
4 burden.

5 As I've said it would be
6 exceptional to lift the PSLRA stay under these
7 circumstances. The fact that the stay is of
8 difficulty to Plaintiffs is a direct result of
9 Congress's decision to enact the statute and of
10 Plaintiffs litigation choices all along the way
11 from filing the complaint in this venue to not
12 filing an amended complaint upon the filing of a
13 definitive proxy, to choosing to delay their
14 opposition to our motion to dismiss.

15 THE COURT: Okay. I guess last
16 question, Ms. Oswell, for you is on the
17 particularization issue. In your brief you
18 asserted the lack of particularization request.
19 There are some cases that go different ways as
20 to whether a request for all documents produced
21 in the state court litigation is sufficiently
22 particular. Sometimes it seems like the reason
23 why those cases go one way or the other is not
24 so much whether all documents in the state court

1 litigation is requested but really what's the
2 nature of that production, how big is it, how
3 tailored is the request, et cetera. We are
4 talking about, sounds like undisputed here, a
5 small number of documents. Are you still making
6 the case that you think the the request is
7 insufficiently particularized in light of that
8 fact?

9 MS. OSWELL: Yes, Your Honor. And
10 I agree that there are cases that go both ways
11 and this can be looked at in a number of ways.
12 It's not particularized here because until
13 Plaintiff's counsel got up to argue, they hadn't
14 explained any way in which these documents
15 helped them with their preliminary injunction
16 motion. And as I said, we still dispute whether
17 that's correct, that they need the documents for
18 it. So it's not particularized in that way.
19 And Plaintiffs haven't met their burden to
20 explain why they need these documents. So it's
21 not that it's not particularized because we
22 can't identify the set of documents. I think
23 the cases that come out our way would also agree
24 that they know what the universe of documents

1 are. It is things that have been produced in
2 other litigations, it's that it's not specific
3 to the claims at issue here. And until
4 Plaintiff's counsel's argument, we hadn't heard
5 anything on that with any specificity.

6 THE COURT: Okay. Thank you. Let
7 me give Mr. Farrell five minutes for rebuttal.

8 MR. FARRELL: Yes, Your Honor.
9 Just to make a few brief points. To the
10 particularized point, I thought it was
11 interesting that we heard no explanation of what
12 potential contents are in these documents that
13 somehow makes them irrelevant to our specific
14 disclosure claims. And as I've been through, I
15 think they are directly relevant. I also draw
16 the Court's attention back again to the Kneiting
17 decision, which is very similar to us here,
18 where it is an M&A case, there was the
19 preliminary injunction that was sought. They
20 argued that the appraisal remedy was adequate.
21 And I can tell you, I've personally seen clients
22 walk away, because they didn't have sufficient
23 information, just like whether to seek
24 appraisals, because there's risk, downside risk

1 in that. And I hear counsel's point that, you
2 know, it's wrongly decided in their view because
3 it relied on a pre PSLRA decision. But if you
4 look at the decision, the Court says that this
5 time constraint, they're referring to the time
6 constraint of about 30 days for a motion to
7 dismiss to be decided before the vote, coupled
8 by a showing of potential irreparable harm,
9 militates in favor of the order for limited and
10 discrete discovery regarding DLP's financial
11 projections, a disclosure issue that troubles
12 the Court. And irreparable harm is key here,
13 because the case law teaches that irreparable
14 harm is a higher standard than undue prejudice
15 under the PSLRA, so I think that decision is
16 completely on all fours with our situation here.

17 And finally, I simply ask that the
18 Court, regardless of how Your Honor rules on the
19 motion today, set a day for a preliminary
20 injunction hearing.

21 THE COURT: Okay. And let's talk
22 about that issue in just a second.

23 MR. FARRELL: Sure.

24 THE COURT: Mr. Farrell. Thank

1 you for your argument and you can be seated and
2 I'll ask some questions about logistics, but I
3 won't require counsel to come forward to the
4 podium here. If you just stand, that will be
5 sufficient to make sure our court reporter can
6 hear your voice well.

7 Okay. We've got a motion to
8 expedite discovery. I've heard argument. I'm
9 going to make a decision this week on that and
10 I'll get that to you as quickly as I can. One
11 way or the other, though, we've got a, as I
12 understand it, shareholder vote set for March
13 23rd and we've got a Plaintiff who has indicated
14 they are going to file a preliminary injunction
15 motion. And I think first question on the
16 Plaintiff's side and to Mr. Farrell, is
17 regardless of which way the Court goes on this
18 expedited discovery motion, are we to expect a
19 preliminary injunction motion from the
20 Plaintiff?

21 MR. FARRELL: Yes, Your Honor.

22 THE COURT: Same question is to
23 setting a preliminary injunction hearing in the
24 schedule. I can't think of the circumstance off

1 the top of my head where a court has actually
2 set a preliminary injunction hearing as to a
3 preliminary injunction motion that hasn't been
4 filed, so I'm not prepared to do that today.
5 All that said, I don't think there's any other
6 hurdle here that relates to that issue other
7 than this motion which I'm going to decide this
8 week. So I think what I would suggest to the
9 parties is that you meet, you discuss, confer
10 and discuss, starting now, what is a schedule
11 going to look like here. You know, one way or
12 the other, assume the motion is denied on the
13 one hand, when are we going to see a preliminary
14 injunction motion? What's the briefing schedule
15 going to look like that would tee this up for a
16 hearing and a decision, not only in advance of
17 the March 23rd vote, but also sufficiently in
18 advance, because Judge Stark has indicated to me
19 that he wants me to decide this issue. There is
20 a right to objection and it might be very
21 truncated, but they will be the prospect if the
22 side that loses to have the ability to object to
23 him. And that has to be accounted for in this
24 time frame which is about a month. And so for

1 now I guess all I'm saying is counsel are going
2 to have to discuss what's the schedule going to
3 look like, how is it going to be manageable and
4 be prepared to act, you know, on that quickly
5 given the time frames that we're talking about.
6 Does that make sense, Mr. Farrell?

7 MR. FARRELL: That makes sense.
8 If Your Honor could give us any guidance on how
9 much time you would like for the objection
10 period that would be, I think, helpful for both
11 parties.

12 THE COURT: It's not going to be
13 able to be anything close to the normal period
14 for objections, which, for example, looks like
15 it's 14 days under the rules, but you get the
16 extra three days. Our electronic filing rules
17 typically give people an extra three days, so
18 you're talking about 17 days for objection and
19 17 days for a ruling. Obviously that's never
20 going to happen. So I mean, look, I'm speaking
21 for the District Court here, but I think if you
22 want to have the ability to make an objection to
23 the decision, you know, you're probably going to
24 need to leave at least, you know, at least five

1 days. And by five days, I probably mean five
2 working days for the process of, you know,
3 well -- for the process of some way for the
4 parties to articulate their views as to why an
5 objection is risk well taken and for the
6 District Court to make a quick decision on that.
7 I mean, I think the reality is more time would
8 be better, but the Court would need at least a
9 week for that process to happen in very short
10 order. I may end up making -- depending on how
11 truncated the schedule is, I may end up making
12 the decision on the preliminary injunction
13 motion at the end of the hearing itself from the
14 bench, or maybe, you know, extremely quickly
15 thereafter. So I guess what I'm saying on my
16 part and I'm sure on Chief Judge Stark's part,
17 the Court will act as quickly as it needs to
18 act, but we need to have a schedule that at
19 least allows for this process to play out in an
20 informed way. So I'm just asking the parties to
21 begin to discuss those issues, because this will
22 all be happening in short order. Does that make
23 sense?

24 MR. FARRELL: Makes perfect sense.

1 Thank you.

2 THE COURT: Ms. Oswell, does that
3 make sense?

4 MS. OSWELL: Yes, Your Honor.

5 THE COURT: I guess, Mr. Farrell,
6 the other issue is, I may be off on this, but
7 here's what I take to be the gist of what
8 Defendant is saying, is look, this complaint is
9 based on, in part, of asserted admissions or
10 misleading statements in a preliminary proxy and
11 based on the idea that these shareholders are
12 going to vote, they can't understand what the
13 vote should be able to understand about this,
14 you know, now we've got a definitive proxy
15 filed, but no amended complaint. And I guess I
16 think part of the Defendant's assertion here is
17 how can we be having a preliminary injunction
18 and a decision as to problems with a preliminary
19 proxy that the shareholder, if it's not the
20 final proxy that the shareholders are actually
21 going to be responding to, wouldn't we have to
22 be talking about what the state of affairs is in
23 the definitive proxy? If that's so, I think
24 some of your briefing here suggests maybe it is

1 so, how are you going to accomplish teeing those
2 definitive proxy related issues up in the
3 context of this truncated schedule?

4 MR. FARRELL: Sure. If Your Honor
5 would prefer, I'm sure we could probably get an
6 amended complaint as soon as tomorrow. The
7 definitive proxy narrows some of the issues,
8 because there are additional disclosures, as I
9 believe Defendants point on their briefing.
10 They relate to an advisor and so it's a pretty
11 narrow issue. It's a lot of disclosure, but
12 it's a narrow issue that's raised in the
13 complaint. So we could, I think very quickly,
14 turn that around if Your Honor would prefer that
15 approach.

16 THE COURT: Yeah, I mean, because
17 I don't know, sounds like maybe you can tell me,
18 if the Plaintiff wasn't talking about the
19 definitive proxy, if we were arguing at this
20 preliminary injunction phase simply about what's
21 in the preliminary proxy, is part of your
22 argument going to be something like these issues
23 are at least in part are moot or something
24 relating to that?

1 MS. OSWELL: It would be both,
2 that they are moot and as a matter of law you
3 cannot state a claim under Section 14A based on
4 a preliminary proxy, so there is nothing really
5 to discuss.

6 THE COURT: So if the Plaintiff
7 wants to try to take those arguments off the
8 table, it's going to need to be focusing on any
9 complaint that in turn focuses on a definitive
10 proxy and arguments about why under the
11 securities laws that definitive proxy fails
12 under the PSLRA from your perspective?

13 MS. OSWELL: Yes, Your Honor.

14 THE COURT: Sounds like, Mr.
15 Farrell, you're not disagreeing necessarily,
16 that you're saying, yeah, we can get an amended
17 complaint on file very quickly.

18 MR. FARRELL: That's exactly what
19 I'm saying, Your Honor.

20 THE COURT: Then I'd suggest you
21 do that. So that from here on out this schedule
22 that gets drafted relates to what's really at
23 issue. Okay. Is there anything further
24 logistically that we need to take up to make

1 sure that we can move through this process, Mr.
2 Farrell, from the Plaintiff's perspective?

3 MR. FARRELL: Nothing else from my
4 perspective, Your Honor.

5 THE COURT: Mrs. Oswell, from the
6 Defendant's perspective?

7 MS. OSWELL: No, Your Honor.

8 THE COURT: Okay. I appreciate
9 counsel's arguments today. For our out of town
10 folks, wish you safe travels. And as I said,
11 I'll get you a decision shortly and the Court
12 will stand in recess. Thank you.

13 (End at 10:46 a.m.)

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1 State of Delaware)
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3 New Castle County)
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5 CERTIFICATE OF REPORTER
6

7 I, Stacy M. Ingram, Certified Court Reporter
8 and Notary Public, do hereby certify that the
9 foregoing record, Pages 1 to 72 inclusive, is a true
10 and accurate transcript of my stenographic notes
11 taken on February 24, 2016, in the above-captioned
12 matter.
13

14 IN WITNESS WHEREOF, I have hereunto set my
15 hand and seal this 24th day of February 2016, at
16 Wilmington.
17

18
19 /s/ Stacy M. Ingram

20 Stacy M. Ingram, CCR
21
22
23
24

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